84307-4

NO.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

ARTHUR RUSSELL,

Respondent.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 38233-4-II
Kitsap County Superior Court No. 08-1-00223-1

PETITION FOR REVIEW

RUSSELL D. HAUGE 13866
Prosecuting Attorney

Randall Avery Sutton 27858
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

Bryan Hershman
Ste. 100 535 Dock St
Tacoma, WA 98402

A copy of this document was sent via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED March 11, 2010, Port Orchard, WA
Original: Court of Appeals
Copy: As set forth at left

TABLE OF CONTENTS

TABLE OF AUTHORITIES
CASES

I. IDENTITY OF PETITIONER

The petitioner is the State of Washington. The petition is filed by Kitsap County Deputy Prosecuting Attorney Randall Avery Sutton.

II. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals' published decision in *State v. Russell*, No. 38233-4-II,[1] in which the Court held that failure to give a limiting instruction pertaining to evidence properly admitted under ER 404(b) was reversible error even where no instruction was requested. No motion for reconsideration was filed. A copy of the Court's decision is attached as an Appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the decision of Court of Appeals conflicts with the decision of this Court and other decisions of the Court of Appeals, all of which uniformly hold that failure to request a limiting instruction at trial waives the issue on appeal (RAP 13.4(b)(1)-(2))?

2. Whether the decision of Court of Appeals presents a significant question of law under the Constitution of the State of Washington because it is contrary to the rule that only claims of manifest constitutional error should be considered for the first time on appeal (RAP 13.4(b)(3))?

---

[1] *State v. Russell*, ___ Wn. App. ___, 2010 WL 436463 (Feb. 09, 2010).

3. Whether the decision of Court of Appeals presents an issue of substantial public interest that should be determined by this Court because its published opinion deviates from the preservation rule that was established to conserve judicial resources and prevent "sandbagging" by parties at trial (RAP 13.4(b)(4))?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Arthur Russell was charged by amended information filed in Kitsap County Superior Court with first-degree rape of a child (domestic violence) of his step-daughter, CR. CP 6.

Before trial, the State sought to admit evidence of acts of abuse Russell committed against CR in Japan and Hawaii before the family moved to Washington, and of acts committed in Florida and Indiana after they left Washington State. 1RP 15. The trial court excluded the Japan evidence, and admitted the Hawaii evidence over Russell's objection. 1RP 23. Russell admitted that the evidence of penile penetration in Florida was relevant: "I concede it is somewhat probative." 1RP 19, 21. Russell also agreed that "both sides need to discuss what happened in Indiana." It also rejected Russell's contention that the Florida evidence was more prejudicial than probative. 1RP 23-24. No limiting instruction was requested or given.

After a trial, the jury found Russell guilty as charged. CP 32-33.

On appeal, the Court of Appeals held that the evidence was properly admitted, but that the failure to give a limiting instruction was reversible error. *Russell*, ___ Wn. App. at ¶ 25-29.

B. **FACTS**

CR, born May 22, 1992, was Russell's step-daughter. 2RP 244-45. CR did not know her biological father and thought of Russell as her father. 2RP 245. She was much closer to Russell than were her siblings. 2RP 251.

The family moved a lot because Russell was in the Navy. 2RP 248. After Russell and CR's mother married, the family moved to Japan from the Philippines. 2RP 245. After two or three years there, they moved to Hawaii. 2RP 246.

"Things that shouldn't have happened" between Russell and CR began when they lived in Hawaii. 2RP 253. He began to caress her body all over with his hands. 2RP 253. It happened in their house, mostly in his room. 2RP 254. He did it more than 10 times while they lived in Hawaii. 2RP 254.

From Hawaii, the Russells moved to Bremerton. 2RP 246, 248. After they moved, Russell continued to touch CR, and started to touch her orally. 2RP 254. He also put his penis in her mouth and made her perform oral sex on him. 2RP 255. Russell also touched her vagina with his hands

and mouth. 2RP 257. It happened multiple times. 2RP 257. She did not know how many times it happened. 2RP 255. It was more than once. 2RP 255. He told her that it was their secret; she told him that she would not tell. 2RP 255. He also told her that it was common for stepdads to this to their daughters. 2RP 255. She believed him. 2RP 256.

The family subsequently moved to Florida. 2RP 247. After they moved to Florida, the abuse continued. 2RP 258. It escalated to penile-vaginal intercourse there. 2RP 269. It happened several times. 2RP 270.

After two years there, the family moved to Indiana. 2RP 247. The intercourse continued after they moved to Indiana. 2RP 259, 270. She did not report it because she did not want anything to happen to Russell. 2RP 259. He told her that he would go to jail if she reported him. 2RP 259.

CR nevertheless eventually told her mother about the abuse while they were living in Indiana. 2RP 259. The revelation precipitated a a violent argument between Russell and CR's mother. 2RP 260.

CR asked her mother not to call the police because she did not want Russell to get into trouble. 2RP 261. After she told her mother, CR's relationship with Russell became awkward, although the abuse stopped. 2RP 261-62. Her mother never reported it. 2RP 262.

Around 2006, the family moved from Indiana to Las Vegas. 2RP 244,

247. Russell moved out in the spring of 2007, and returned to Washington State. 2RP 263, 274. Russell and CR's mother began divorce proceedings. 2RP 263.

Because of the divorce, CR's mother pressured her to report the abuse. 2RP 263. Her mother threatened to send her to the Philippines to live with her biological father, whom she did not know. 3RP 301. CR eventually reported the abuse to a school counselor because her mother kept reminding her what Russell did, and she was tired of the burden carrying it around. 2RP 262. CR did not tell her mother that she was going to speak to the school counselor. 3RP 312. She had been in counseling as a result of the abuse since then. 2RP 270.

CR never talked to her siblings about the abuse. 2RP 267. She also denied the allegations to Shanna, who was Russell's daughter from a prior marriage. 2RP 267. CR told Shanna the allegations were untrue because she did not want anyone else to know about them, to protect both Russell, and herself. 2RP 267.

The same was true of her conversations with her sister-in-law Kristine. 2RP 267-68. Before CR ran away she told her sister-in-law, Kristine, that her mother was pressuring her to say that Russell had molested her, and also that it was not true. 3RP 303.

Kristal Russell, CR's 21-year-old sister, never actually saw Russell sexually abuse CR. 3RP 324. However, until they moved to Las Vegas, CR and Kristal shared a room. 3RP 324. Kristal verified that on occasion, she would wake up and CR would not be there. 3RP 324. Her mother would be at work, and she would find CR and Russell in their parents' room with the door locked. 3RP 324. When she would knock on the door, they would ask her to give them a second. 3RP 324. This happened often. 3RP 325. It happened in Hawaii, Washington, Florida, and Indiana. 3RP 325. Russell was never in the bedroom with the door locked with any of the other children. 3RP 325.

Russell testified at trial and denied ever touching CR inappropriately. 3RP 340-41 Russell felt he and CR were close because of the way her mother treated her. 3RP 347. The mother was very harsh and demanding and had a bad temper. 3RP 347.

Russell stated that he first heard about the abuse allegation from his wife when they were still in Indiana. 3RP 356. She confronted him with the abuse allegation, and he denied it. 3RP 357. Law enforcement was not called. 3RP 357. Russell never asked CR why she would make up the allegations. 3RP 364.

V. ARGUMENT

THIS COURT SHOULD ACCEPT REVIEW BECAUSE THE COURT OF APPEAL'S DECISION BECAUSE THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO PRECEDENT THAT UNIFORMLY HOLDS THAT THE FAILURE TO REQUEST A LIMITING INSTRUCTION WAIVES THE ISSUE ON APPEAL.

1. The considerations governing acceptance of review set forth in RAP 13.4(b) support acceptance of review.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should accept review because the decision of the Court of Appeals because all four criteria are met.

2. The published opinion of the Court of Appeals is contrary to unanimous Washington precedent that hold that the failure to give a limiting instruction at trial regarding ER 404(b) evidence may not be raised as error on appeal where no instruction was requested.

Russell was charged first-degree rape of a child (domestic violence) of his step-daughter, CR. CP 6. The trial court admitted brief evidence of Russell's sexual acts with CR that occurred in Hawaii and Florida, for the

purpose of showing Russell's lustful disposition toward this particular victim. 1RP 23-24. The Court of Appeals concluded that the evidence was properly admitted for this purpose. *Russell*, ___ Wn. App. at ¶ 25 (*citing State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991)).

Despite Russell's failure to request a limiting instruction at trial, the Court of Appeals went on to conclude that the trial court's failure to give such an instruction was reversible error. *Russell*, ___ Wn. App. at ¶ 29. The Court concluded that this Court's recent holding in *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007), mandates that an instruction be given irrespective of whether the defense has requested one. This conclusion conflicts with every case in this Court and the Court of Appeals that has considered the issue.

Foxhoven, however, does not address this issue for the simple reason that a limiting instruction *was* given in that case. This is also true in other cases cited by the Court. *See State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995); *State v. Saltarelli*, 98 Wn.2d 358, 370, 655 P.2d 697 (1982) (evidence in question found to be inadmissible on relevance grounds, but instruction had been given); *State v. Goebel*, 36 Wn.2d 367, 369, 218 P.2d 300 (1950) (evidence in question found to be inadmissible on relevance grounds, but instruction had been given). In *State v. Whalon*, 1 Wn. App. 785, 795, 464 P.2d 730 (1970), *review denied*, 78 Wn.2d 992 (1970), the case

was reversed because the evidence was more prejudicial than probative. Moreover, a limiting instruction, albeit an overbroad one, had been given. *Id.* Finally, in *State v. Murphy*, 44 Wn. App. 290, 295, 721 P.2d 30, *review denied*, 107 Wn.2d 1002 (1986), the Court affirmed while observing that no limiting instruction had been give. The opinion is silent as to whether one was requested.

In contrast to the cases cited by the court below, the cases that *have* considered whether an instruction must be requested before the issue may be considered on appeal have uniformly held that failure to request the instruction waives the issue. Indeed, Division II itself recently recognized this body of law:

> [P]rior cases have established that failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence. *See State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27, *review denied*, 155 Wn.2d 1018, 124 P.3d 659 (2005) ([w]e can presume that counsel did not request a limiting instruction for ER 404(b) evidence to avoid reemphasizing damaging evidence); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence); *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993).

State v. Yarbrough, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009). The Court previously noted the principle in *State v. Stein*, 140 Wn. App. 43, 165

P.3d 16 (2007):

> Stein also argues that the trial court should have instructed the jury to consider the ER 404(b) evidence only for the limited purposes for which it was admitted. Although Stein would have been entitled to such an instruction had he requested it, ER 105, he failed to do so. A party who fails to ask for a limiting instruction waives any argument on appeal that the trial court should have given the instruction. *State v. Newbern*, 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999) (citing *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 255, 744 P.2d 605 (1987)). Thus, Stein has waived his right to complain about the trial court's omission.

See also State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993) (failure to request a limiting instruction regarding ER 404(b) evidence waived that issue for appeal); *State v. McGhee*, 57 Wn. App. 457, 462, 788 P.2d 603 (1990) (same).

This Court approved this rule in *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997):

> The failure of a court to give a cautionary instruction is not error if no instruction was requested. *State v. Hess*, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975). Myers never requested a limiting instruction. And, absent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others. *Lockwood v. AC & S, Inc.*, 109 Wn.2d 235, 255, 744 P.2d 605 (1987).

The Court of Appeals below purported to distinguish *Myers* on the grounds that it did "not mention ER 404(b) or address the circumstance here." *Russell*, ___ Wn. App. at ¶ 27. Regardless of any explicit reference in *Myers* to ER 404(b), this distinction is unsustainable.

Myers was charged with sexual exploitation of a minor based on videotapes he took of his seven-year-old daughter. *Myers*, 133 Wn.2d at 29-30. On appeal he claimed the trial court erred in admitted evidence of his videotaping of other children. *Myers*, 133 Wn.2d at 35-36. This is clearly ER 404(b) evidence.

Moreover, *Myers* cited to *State v. Hess* as authority that failure to request a limiting instruction waives the issue for appeal. In *Hess*, a pre-rule case,[2] the defendant argued that it was error to admit evidence of uncharged acts under the common scheme or plan exception to show intent, because no limiting instruction was given. This Court rejected that contention, because no instruction was requested:

> No such instruction was requested. Thus, there is no error.

State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975). *See also State v. Noyes*, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1966) (a trial court does not have a duty to give a limiting instruction sua sponte after admitting evidence of prior bad acts); *State v. Scott*, 93 Wn.2d 7, 14, 604 P.2d 943 (1980) (in the absence of either a violation of a constitutional right or a request to instruct

---

[2] *But see* ER 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

there can be no error assigned on appeal for failure to give an instruction); *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984) (error in the admission of ER 404(b) evidence does not raise a constitutional claim).

These cases also comport with the the plain language of ER 105:

> When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly.

(Emphasis supplied).

Finally, as is implicitly and explicitly recognized in the foregoing authorities, the decision as to whether to request a limiting instruction is a tactical decision. Limiting instructions can be difficult to draft and can be harmful to the defense. An instruction informing the jury that it can consider the evidence for a particular purpose can hamper a defense argument that the evidence has no bearing on the issues at trial. On the other hand, an instruction that the jury cannot consider the evidence for other purposes may also interfere with purposes for which the defense may wish to use the evidence.

Indeed, here experienced defense counsel[3] used the evidence to question CR's credibility, arguing that she would have reported it or someone

[3] Trial counsel had himself previously raised ER 404(b) issues on appeal. *See, e.g., State v. Acosta,* 123 Wn. App. 424, 98 P.3d 503 (2004).

would have noticed, if it had actually occurred. 3RP 404-05, 405-06. A limiting instruction could well have taken the force from this argument. It cannot be presumed that the failure to request the instruction was an oversight by Russell's counsel. Yet the opinion below would require the trial court to impose a limiting instruction on the defense even where it was unwanted.

Based on the foregoing, it is clear that the published opinion of the court below is a radical departure from existing precedent. Review should be granted to correct it.

3. Any purported error would be harmless.

Even were the absence of a limiting instruction reviewable despite Russell's failure to request one reviewable, the Court of Appeals would also be in error in concluding that the purported error was harmful.

The erroneous admission of ER 404(b) evidence does not raise a constitutional claim. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). The applicable test, therefore, for harmless error is whether, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Robtoy*, 98 Wn.2d 30, 44, 653 P.2d 284 (1982).

Here, Russell did not contest the admission of the evidence that he and CR had ongoing penile-vaginal intercourse in Indiana when she was 13

or 14. That this act first also occurred in Florida after he had molested her in Washington by performing oral sex on her and making her perform oral sex on him on multiple occasions could not seriously further detract from the jury's perception of him. The same is true of the 10 times he manually molested her in Hawaii, before they moved to Washington.

Moreover, the actual evidence admitted, in the context of two days of witness testimony was brief. The following is all that CR mentioned of Hawaii:

Q. Okay. What happened between you and Curt?

A. Things that shouldn't have happened.

Q. Do you remember the first time that these things happened?

A. When I lived in Hawaii.

* * *

Q. [By Mr. Cure] [CR], we were talking – [CR], we were talking about the time when you lived in Hawaii. Can you tell us what happened between you and your dad when you were in Hawaii?

A. He would touch me in inappropriate ways.

Q. And how old were you when the first time -- that you remember the first time it happening and why?

A. I don't know.

Q. How would he touch you in inappropriate ways?

A. By caressing my body.

Q. And what would he caress your body with?

A. With his hands.

Q. And what part of your body did he touch?

A. Any part.

Q. Any part. All parts?

A. Yes.

Q. Where did this happen?

A. In the house.

Q. Where in the house?

A. In his room.

Q. Always in his room?

A. No.

Q. How often did it happen?

A. I don't know.

Q. More than once?

A. Yes.

Q. More than 10 times?

A. Yes.

2RP 252-54. The Florida testimony was substantively even shorter:

Q. And what happened in Florida?

A. It continued.

Q. Did it get worse?

A. Yes.

Q. How? Did he touch you in ways that were different in the way he touched you in previous days?

A. Yes.

Q. And what were those ways?

A. [No response.]

MR. CURE: Your Honor, I ask permission to ask a few leading questions.

THE COURT: Ask the question, before – go slowly.

MR. CURE: Okay. Thank you.

Q. [By Mr. Cure] When you were in Florida, did you engage in vaginal-penile intercourse?

MR. WEAVER: Objection.

THE COURT: Sustained.

Q. [By Mr. Cure] [CR], can you tell us what happened between you and your dad in Florida?

A. [No response.]

Q. [CR], I'm going to move on and we'll come back to Florida in a little bit.

2RP 258. Eventually, the prosecutor returned to the subject and elicited the following testimony:

Q. I want to go back to Florida. Can you tell us what was different about the touching in Florida than it was different in the previous states? Do you remember?

A. Yes.

Q. What happened, [CR]?

A. [No response.]

Q. [CR], can you tell us -- [CR], would you be able to answer that question after a break?

A. Yes.

* * *

Q. [By Mr. Cure] All right. [CR], can you tell us what happened between you and Curt in Florida?

A. He had intercourse.

Q. His penis in your vagina?

A. Yes.

Q. Had that happened more than once?

A. Yes.

Q. It happened several times?

A. Yes.

2RP 268-70.

Nor did the State emphasize the evidence in its closing argument. Indeed in an argument that consumed nine pages of transcript it mentioned the out-of-state acts only once, and even then only to place Russell's conduct in a timeline context:

> And the behavior escalated from touching in Hawaii to oral sex in Washington to intercourse in Florida. ...
>
> Moved to Hawaii, where the abuse began. [CR] testified, but he would touch her inappropriately with his hands, would touch her vagina and her breasts. From Hawaii they moved to Washington. ...
>
> The abuse continued to Florida, vaginal-penile intercourse.

3RP 388. The State did not mention it at all in its rebuttal argument. 3RP 414-16.

The defense specifically reminded the jurors that they could not "convict Mr. Russell for what happened in Hawaii, ... for what happened in Indiana or Florida, [but could] only convict him for testimony based upon what happened in Washington." 3RP 405. Russell also repeatedly referred to the alleged "years of abuse" to question CR's credibility, arguing that she would have reported it or someone would have noticed, if it had actually occurred. 3RP 404-05, 405-06. Beyond these brief references, there was no further mention of the other abuse in Russell's 18-page closing argument.

Thus, even if the trial court erred in failing to give a limiting

instruction, the error would be harmless. Review should be granted.

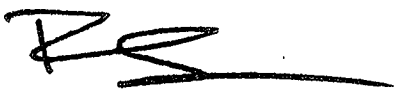
VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the court grant review of the decision of the Court of Appeals.

DATED March 11, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



Randall Avery Sutton
WSBA No. 27858
Deputy Prosecuting Attorney

\\TSCLIENT\C\USERS\RANDY\DOCUMENTS\WORK\RUSSELL, ARTHUR 01DA 08-60\APPEAL DOCS\RUSSELL PRV.DOC

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ARTHUR C. RUSSELL, Appellant.	No. 38233-4-II PUBLISHED OPINION

BRIDGEWATER, J. — Arthur C. Russell appeals his conviction for first degree child rape—domestic violence. We hold that the trial court abused its discretion by admitting ER 404(b) evidence of other alleged sexual abuse of the victim without giving the jury a required limiting instruction. We reverse and remand.

FACTS

Russell met CR's[1] mother, Marilou, in 1993 when Russell was in the Navy; the couple married in 1995. CR was born May 22, 1992, the youngest of Marilou Russell's five children. CR met Russell in the Philippines, her birthplace, when she was about two or three years old.

[1] We use CR's initials to protect her privacy.

After her mother married Russell, CR came to think of him as her father. CR did not know her biological father. When CR was growing up, they moved frequently because of Russell's military service. CR' s mother worked and Russell would be at sea for six months at a time.

After Russell and Marilou married, the family moved to Japan from the Philippines. After two or three years there, they moved to Hawaii. They stayed in Hawaii for about three years, where CR attended kindergarten to second grade and CR was age six through eight or nine. CR testified that in Hawaii Russell began to caress her body all over with his hands. This occurred in their house, multiple times, and mostly in Russell's bedroom.

From Hawaii, the Russells moved to Bremerton just as CR was starting third grade. CR was about nine years old, and the family stayed in Washington until CR was in fifth grade. After they moved to Washington, Russell continued to touch CR and started to touch her orally. Russell made CR perform oral sex on him, and he also touched her vagina with his hands and mouth. CR testified that this occurred multiple times.

The family stayed in Washington for about three years, and then they moved to Florida. After they moved to Florida, the abuse escalated to multiple occurrences of penile-vaginal intercourse.

After two years in Florida, the family moved to Indiana, where the intercourse continued. CR did not report it because she did not want anything to happen to Russell. Nevertheless, CR eventually told her mother about the abuse while the family was living in Indiana. CR asked her mother not to call the police because she did not want Russell to get into trouble. After CR told her mother, CR's relationship with Russell became awkward, but the abuse stopped. Her mother never reported it.

Around 2006, the family moved from Indiana to Las Vegas. Russell moved out of the family home in the spring of 2007, and returned to Washington State. Russell and CR's mother began divorce proceedings.

Because of the divorce, CR's mother pressured CR to report the abuse. CR left home to stay with a friend and was ultimately placed in foster care. CR eventually reported the abuse to a school counselor. A social worker interviewed CR at her high school and she received counseling.

The State of Washington charged Russell by amended information in Kitsap County Superior Court with first degree rape of a child—domestic violence, regarding his alleged abuse of CR while the family lived in Bremerton. Before trial, the State sought to admit evidence under ER 404(b) of acts of abuse Russell committed against CR in Japan and Hawaii before the family moved to Washington, and of acts committed in Florida and Indiana after they left Washington State. The State alleged that Russell began abusing CR when she was three years old, while he was stationed in Japan. The abuse continued as the family moved to each new location. CR had no independent recollection of the abuse in Japan, but she did recall the abuse beginning in Hawaii. CR also recalled it happening in Washington and continuing in Florida, where there was an allegation of penile-vaginal penetration. CR also recalled abuse in Indiana, where she reported it to her mother, and thereafter it stopped.

Defense counsel agreed that some of the evidence was admissible, stating that both sides needed to discuss what happened in Indiana. Counsel was more concerned about the earlier incidents in Japan and Hawaii. He objected that CR had no independent recollection of the events in Japan. He also expressed concern about whether CR was competent to testify about

what had happened when she lived in Hawaii, due to her young age at that time. The defense therefore asked that the evidence of what occurred in Japan and Hawaii be excluded.

Defense counsel admitted that the evidence of penile penetration in Florida was relevant: "I concede it is somewhat probative." 1 RP at 19. He nevertheless argued that it should be excluded because it was more prejudicial than probative.

The State responded that it intended to focus on the events in Washington. Nevertheless, it pointed out that the evidence was relevant because it showed progression and grooming behavior. Russell went from touching and caressing in Hawaii, progressed to oral sex in Washington, and then to full penile-vaginal intercourse in Florida. The State argued that the evidence was corroborative and also showed Russell's "[lustful] disposition" toward CR.[2] 1 RP at 22.

The trial court excluded the evidence regarding events in Japan. It admitted the evidence regarding events in Hawaii, noting that defense counsel's concerns about competency in this time frame could be addressed at cross-examination. The trial court also admitted the Florida evidence, finding it relevant and not more prejudicial than probative.

At trial, CR testified to events as above described. She also testified that she never told her siblings about the abuse. She also explained why she had denied the allegations to her stepsister, Shanna LaMar, who was Russell's biological daughter from a prior marriage, stating that she told Shanna the allegations were untrue because she did not want anyone else to know

[2] The record actually says "lawful disposition." 1 RP at 22. But it is clear from the context that this is either a typographical error or the deputy prosecutor merely misspoke. The State clearly meant that the proffered evidence showed Russell's *lustful* disposition.

about them, to protect both Russell and herself. CR similarly testified that she told her sister-in-law, Kristine, that the allegations were not true.

CR's older sister, Kristal Russell, testified that she never actually saw Russell sexually abuse CR. However, she shared a room with CR and remembered that CR was often in Russell's bedroom with the door locked. This happened only with CR, and it occurred in Hawaii, Washington, Florida, and Indiana.

Russell's daughter, LaMar, testified on his behalf. LaMar said that she never saw Russell touch CR inappropriately.

Russell also testified at trial and denied ever touching CR inappropriately. The jury found Russell guilty as charged. Russell appeals.

DISCUSSION

Russell argues that he was denied a fair trial by the trial court's admission of evidence of alleged sexual misconduct by Russell against CR before and after the acts in Washington for which he was charged. We agree.

Interpretation of an evidentiary rule is a question of law, which we review de novo. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When the trial court has correctly interpreted the rule, we review the trial court's decision to admit evidence under ER 404(b) for an abuse of discretion. *Foxhoven*, 161 Wn.2d at 174. Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Foxhoven*, 161 Wn.2d at 174. Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. *Foxhoven*, 161 Wn.2d at 174.

ER 404(b) prohibits a court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." This prohibition encompasses not only prior bad acts and unpopular behavior but any evidence offered to show the character of a person to prove the person acted in conformity with that character at the time of a crime. *Foxhoven*, 161 Wn.2d at 175.

ER 404(b) evidence, may, however, be admissible for another purpose, such as proof of motive, plan, or identity. *Foxhoven*, 161 Wn.2d at 175. Relevant here, such evidence may also be admitted to show the defendant's "lustful disposition," that is, sexual desire for a particular victim. *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991); *State v. Guzman*, 119 Wn. App. 176, 182, 79 P.3d 990 (2003), *review denied*, 151 Wn.2d 1036 (2004) (citing *State v. Ferguson*, 100 Wn.2d 131, 134, 667 P.2d 68 (1983) (quoting *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953))). ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged. *Foxhoven*, 161 Wn.2d at 175 (citing *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

In this case, the evidence in question was offered and admitted to show the defendant's "[lustful] disposition." 1 RP at 22. While the admission of other acts evidence for such purpose may be appropriate, *see Ray*, 116 Wn.2d at 547, certain requirements must be met.

Before admitting ER 404(b) evidence, a trial court *must* (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of

the crime charged, and (4) weigh the probative value against the prejudicial effect. *Foxhoven*, 161 Wn.2d at 175; *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *Lough*, 125 Wn.2d at 853. This analysis "must be conducted on the record." *Foxhoven*, 161 Wn.2d at 175 (citing *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)). Moreover, "If the evidence is admitted, a limiting instruction must be given to the jury." *Foxhoven*, 161 Wn.2d at 175 (citing *Lough*, 125 Wn.2d at 864). The trial court gave no such instruction here.

Russell contends on appeal that none of the five requirements noted above are met. But as for challenges to evidentiary admissions, a party may assign error on appeal only on the specific ground of the evidentiary objection made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). If the specific objection made at trial is not the basis of the appellant's argument before this court, the appellant has "lost [his] opportunity for review." *Guloy*, 104 Wn.2d at 422. At the ER 404(b) hearing, Russell made no objection to the admission of the other alleged acts based on insufficiency of the State's offer of proof, nor did he challenge the purpose for which the evidence was sought to be admitted, nor did he challenge the relevance of such evidence.[3] Accordingly, Russell's newly made arguments regarding those alleged errors are not properly before us. However, Russell did argue to the trial court that the admission of the evidence would be unduly prejudicial; thus Russell's challenges regarding the latter two *Foxhoven* requirements, which bear directly on prejudice, are properly before us.

[3] These alleged evidentiary errors also are not "manifest errors affecting a constitutional right," that could be first raised on appeal under RAP 2.5(a)(3). *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (for error to be first raised on appeal under RAP 2.5(a)(3), it must be both manifest and truly of constitutional magnitude).

Russell contends that the trial court abused its discretion in ruling that the evidence of other acts of sexual misconduct was more probative than prejudicial. ER 401 defines relevant evidence as evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. *State v. Stenson*, 132 Wn.2d 668, 701-02, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Relevant evidence is admissible, ER 402, but may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; *Stenson*, 132 Wn.2d at 702. A trial judge has wide discretion in balancing the probative value of evidence against its potentially prejudicial impact. *Stenson*, 132 Wn.2d at 702 (citing *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996)).

Generally, courts will find that probative value is substantial in cases where there is very little proof that sexual abuse has occurred, particularly where the only other evidence is the testimony of the child victim. *State v. Sexsmith*, 138 Wn. App. 497, 506, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008). We review the trial court's balancing of probative value against prejudicial effect for abuse of discretion. *Sexsmith*, 138 Wn. App. at 506. While this standard of review is highly deferential, we note that the required balancing in sex cases is particularly delicate. "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where *the prejudice potential of prior acts is at its highest.*" *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (emphasis added). As noted, case law permits the evidence at issue here to be admitted for purposes of showing defendant's lustful disposition toward the victim.

Ray, 116 Wn.2d at 547. Accordingly, we hold that the trial court's admission of the ER 404(b) evidence, standing alone, was not itself an abuse of discretion.

However, we apply our Supreme Court's recent articulation of the ER 404(b) evidence admission requirements in *Foxhoven*, which states that where such evidence is admitted, a limiting instruction "must be given to the jury." *Foxhoven*, 161 Wn.2d at 175. Notably, the cases from which this rule is derived place the burden of giving such instruction on the trial court. *See e.g.*, *Foxhoven*, 161 Wn.2d at 175; *Lough*, 125 Wn.2d at 864 (noting that because the trial court repeatedly gave a limiting instruction to the jury at the conclusion of trial and before each witness in question testified, the record failed to support a contention that the jury used the ER 404(b) evidence for an improper purpose; as the limiting instruction was given clearly and repeatedly and a jury is presumed to follow the trial court's instructions). *See also Lough*, 125 Wn.2d at 860 n.18 (citing *State v. Brown*, 113 Wn.2d 520, 529, 782 P.2d 1013, 787 P.2d 906 (1989), for the proposition that the trial court should explain the purpose of the evidence and give a cautionary instruction to consider it for no other purpose). *See also Brown*, 113 Wn.2d at 529 (citing *Saltarelli*, 98 Wn.2d at 362 (citing *State v. Goebel*, 36 Wn.2d 367, 378-79, 218 P.2d 300 (1950))). *See also Goebel*, 36 Wn.2d at 379 ("the court should state to the jury whatever it determines is the purpose (or purposes) for which the evidence is admissible; and it should also be the court's duty to give the cautionary instruction that such evidence is to be considered for no other purpose or purposes"). *See also State v. Whalon*, 1 Wn. App. 785, 794, 464 P.2d 730 (1970), *review denied*, 78 Wn.2d 992 (1970) (citing *Goebel*).

The State cites to *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997), for the general rule that the trial court's failure to give a cautionary instruction is not error if no

instruction was requested. But *Myers* does not mention ER 404(b) or address the circumstance here,[4] and we find *Foxhoven* to be controlling on this issue.

We have previously acknowledged the trial court's obligation to give a cautionary instruction. In *State v. Murphy*, 44 Wn. App. 290, 295, 721 P.2d 30, *review denied*, 107 Wn.2d 1002 (1986), we noted that our Supreme Court's directive in *Saltarelli*, 98 Wn.2d at 361-62 (citing *Goebel*) required the trial court to give a cautionary instruction, but we disregarded the trial court's failure to do so in that circumstance because "we believe[d] the outcome of the trial would not have been materially affected." *Murphy*, 44 Wn. App. at 295. That is not the case here.

The absence of a limiting instruction has particular impact in this case. In closing argument the State drew attention to Russell's alleged history of sexual abuse of CR, noting that his "behavior escalated from touching in Hawaii to oral sex in Washington to intercourse in Florida." 3 RP at 388. Moreover, the trial court instructed the jury that "[i]n order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition." 3 RP at 379 (instruction 1). Accordingly, the jury was *required* to consider the other acts evidence when determining Russell's guilt on the charged offense. Under these circumstances we cannot say that the absence of a limiting instruction did not affect the outcome of the trial. We hold that given the facts of this case the trial court abused its discretion in failing to give a limiting instruction regarding the ER 404(b) evidence of

[4] *Myers* is further distinguishable because the defense explicitly withdrew its objection to the admission of the videotape evidence in question and, therefore, failed to preserve for appeal any issue regarding admission of the evidence. *Myers*, 133 Wn.2d at 35-36.

Russell's alleged sexual abuse of CR occurring before and after the alleged crime in Washington for which he was charged. Accordingly, we reverse Russell's conviction and remand for a new trial.[5]

Reversed and remanded.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.

[5] We recognize that the legislature passed RCW 10.58.090(1) in 2008, which states in relevant part: "In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403." The evidence may arise from a charged or uncharged sex offense. *See* RCW 10.58.090(4) and (5). Because this exception to ER 404(b) went into effect June 12, 2008, after the verdict in Russell's trial, and because the parties do not argue that it applies here, we conclude that RCW 10.58.090 has no impact upon the present appeal. *See State v. Kennealy*, 151 Wn. App. 861, 887 n.7, 214 P.3d 200 (2009) (so noting).

We further note that while RCW 10.58.090 will be available on remand, *see* LAWS OF 2008, ch. 90, § 3, its operation on the threshold issue of admissibility of other acts evidence has no impact upon the post-admission requirement that our Supreme Court has placed upon the trial court to give a limiting instruction if such evidence is admitted. *See Foxhoven,* 161 Wn.2d 175.